Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1994

NICHOLAS FERRANTE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. In a civil litigation brought by the United States of America exclusively under the provisions of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 *et seq.* ("RICO"), can an individual defendant be summarily adjudicated a racketeer--and then sanctioned with sweeping injunctive, divestiture and disgorgement orders--based on the drawing of adverse inferences against the defendant because of his invocation of the Fifth Amendment Privilege against self-incrimination?

2. In a civil RICO litigation and in the summary judgment context under Rule 56 of the Federal Rules of Civil Procedure, has a defendant suffered impermissible quasi-criminal liability where the District Court, without affording the defendant adequate constitutional and procedural safeguards under the Fifth and Eighth Amendments to the Constitution, has (i) barred the defendant from any participation whatsoever in the corporations he has owned and managed for decades, (ii) required the defendant to "divest" himself of any and all types of interest in the corporations he founded and in the solid waste disposal industry in general, (iii) directed him to refrain permanently from engaging in any commercial activity regarding the solid waste disposal industry and (iv) compelled him to disgorge proceeds from allegedly illegal activity which took place, if it occurred at all, more than a decade ago?

List of Parties

The petitioner is Nicholas Ferrante.[1]

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1. Mr. Ferrante is one of approximately 112 defendants originally named in the complaint filed in June 1989. Mr. Ferrante was the only defendant who was the subject of the Government's April 1994 motion for summary judgment which resulted in the District Court's October 13, 1994 Memorandum and Order from which the appeal to the United States Court of Appeals for the Second Circuit was taken; this petition is filed with respect to the Second Circuit's January 23, 1995 order resolving the appeal. None of the other defendants participated in the appeal to the Second Circuit or in the underlying proceedings regarding the Government's motion for summary judgment against Mr. Ferrante. The other originally named defendants are Private Sanitation Industry Association of Nassau/Suffolk Inc.; Local 813 of the International Brotherhood of Teamsters; A-1 Carting Corp.; AA&M Carting Co.; Ace Garbage & Rubbish Removal, Inc.; All Weather Carting Corp.; Associated Waste Disposal Co.; B&D Carting, Inc.; Bonsera, Inc.; Budget Roll-Off Systems, Inc.; C&C Refuse Carting Corp.; Ciano and Sons Carting Co., Inc.; Comet Carting Company; Daniel Finley Allen Co., Inc.; Delta Carting Corp.; Dependable Sanitation Corp.; Detail Carting; Enviro Carting Co.; Ever Ready Sanitation Corp.; Harbor Carting Corp.; Hickey's Carting, Inc.; Hillside Carting Company, Inc.; Jamaica Ash & Rubbish Removal Co., Inc.; Long Island Rubbish Removal Corp.; Maggio's M & P Carting Service, Inc.; MCM Sanitation, Inc.; Metro Waste, Inc.; Mets Roll-Off Service, Inc.; Monbro Sanitation Service, Inc.; Prudential Waste Disposal, Inc.; Sail Carting & Recycling Corp.; Salem Sanitary Carting Corp.; South Side Carting Co., Inc.; SSC Corp.; Standard Commercial Cartage, Inc.; Sun Carting, Inc.; Sunset Sanitation Corp.; Superior Waste Systems, Inc.; TWA Carting Corp.; II Cousins Carting Corp.; U-Need-A-Roll-Off Corp.; Unique Sanitation Co., Inc.; Vigliotti Brothers Carting Corp.; Vinnie Monte's Waste Systems, Inc.; V&J Rubbish Removal, Inc.; Wayside Carting, Inc.; Michael Acquafredda; Bernard Adelstein; John Allen; Sarah

The respondent is the United States.

Allen; James Allesandria; Vito Aniello; Salvatore Avellino, Jr.; Joseph Bonsera; Michael Bonsera; Charles Cannizzaro; Richard Carey; Pasquale Casagrande; Richard Ciano; Raniero Colatosti; Craig Comerford; Antonio Corallo; James J. Corrigan, Jr.; Edward DeMatteo; Ernest DeMatteo; Emedio Fazzini; Joseph Ferrante; John Guglielmo; John Haynes; Dennis Hickey; Robert Husak; Jerome Kowalski; Vincent Maggio; Michael Malena; John Maratea; Peter Marcello; Anthony Miello; Anthony Montesano, Jr.; Vincent Montesano; Anthony Natale; Frank Notarantonio; John Pagano; Frank Palopoli; Salvatore Palopoli; David Pamlanye; Steven Pamlanye; Ralph Pantony; Joseph Petrizzo; Joseph Pezza; Pasquale Pezza; Peter Reali; Robert Renna; Arthur Romersa; Thomas Ronga; Franco Rotundo; Salvatore Santoro; Robert Schuman; John Senia; Pat Sesti; Peter Stramiello; Glenn Thweatt; Orlando Velocci; Anthony Vespucci; Allen Vesting; Arnold Vigliotti; Glen Vilchek; Joseph Vittorio; Michael Walstrum; and James Winters.

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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1994

NICHOLAS FERRANTE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

Opinions Below

The District Court's October 13, 1994 Memorandum and Order (the "October 1994 Order") granting the Government's motion for summary judgment and entering injunctive relief and divestiture and disgorgement orders against Mr. Ferrante is not reported (App. C, 25a-42a). The majority and dissenting opinions of the United States Court of Appeals for the Second Circuit with respect to Mr. Ferrante's emergency motion for a stay pending appeal and an expedited appeal are reported. *United States v. Private Sanitation Industry Association of Nassau/Suffolk, Inc.*, 44 F. 3d 1082 (2d Cir. 1995). (App. B, 5a-24a).

The January 23, 1995 order sought to be reviewed, in which the Second Circuit affirmed the District Court's October 1994 Order, is unreported. (App. A, 1a-4a).

Statement of Jurisdiction

This Court's jurisdiction to review the Second Circuit order dated January 23, 1995 is invoked pusuant to 28 U.S.C. §1254 (1).

Respondent United States of America commenced the underlying litigation on or about June 6, 1989 in the United States District Court for the Eastern District of New York against petitioner and approximately 111 other defendants; virtually all of the defendants, including petitioner, were involved in the solid waste disposal industry in Nassau and Suffolk Counties in New York. The Government's complaint was grounded exclusively on the civil provisions of the federal racketeering statute, and jurisdiction in the District Court was predicated on §1964 of RICO.

The District Court entered summary judgment against petitioner as a consequence of a motion seeking summary judgment filed by the Government in April 1994 under Fed. R. Civ. P. 56. No other defendant in the action, which is still pending in the District Court against the majority of the originally named defendants, was the subject of the Government's April 1994 summary judgment motion.

Petitioner filed an appeal to the Second Circuit on or about October 26, 1994, invoking the appellate court's jurisdiction pursuant to 28 U.S.C. §1292(a) (1), since the October 1994 Order granting summary judgment contained injunctive relief against Mr. Ferrante. Petitioner filed a motion in the Second Circuit on November 14, 1994, requesting, pursuant to Fed. R. App. P. 27, a stay of enforcement of the October 1994 Order; petitioner also moved for an expedited appeal.

By opinion filed January 11, 1995, a panel of the Second Circuit denied petitioner's motion for a stay pending the appeal and granted petitioner's request for an expedited appeal, with Judge Gerald W. Heaney, of the United States Court of Appeals for the Eighth Circuit, sitting by

designation, filing an opinion in which he dissented from the panel majority's refusal to grant a stay. *United States v. Private Sanitation Industry Association of Nassau/Suffolk, Inc., supra*, 44 F. 2d at 1085. (App. B, 10a-24a).

By the order dated January 23, 1995, the Second Circuit affirmed the District Court's October 1994 Order. (App. A, 1a-4a). The present Petition for a Writ of Certiorari is timely filed within 90 days of January 23, 1995.

Statutes and Constitional Provisions Involved

18 U.S.C. §1962(c) -- the only substantive provision of RICO on which the Government's complaint is based -- provides in full:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. §1964 -- the civil remedy provision of RICO -- is, in relevant part, as follows:

> (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropiate orders, including, but not limited to: ordering any person to divest himself of any interests, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including...prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commence...

> (b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.
>
> . . .
>
> (d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

The Fifth Amendment to the United States Constitution provides in part:

> No pe son...shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law...

The Eighth Amendment to the United States Constitution provides in part:

> ...[E]xcessive fines [shall not be] imposed, nor cruel and unusual punishments inflicted.

Statement of the Case

A. The Litigation's Context

Proclaimed by the Government itself as the "'largest civil RICO case ever,'" *see United States v. Private Sanitation Industry Association of Nassau/Suffolk, Inc.*, 793 F. Supp. 1114, 1120 (E.D.N.Y. 1992) ("*PSIA I*"), this massive litigation named, among others, 64 individual defendants, the majority of them owners or executives of the approximately 44 corporate defendants involved in the solid

waste disposal industry on Long Island. One of the 64 individual defendants was petitioner. Two of the corporate defendants -- Unique Sanitation Co., Inc. ("Unique") and U-Need-A-Roll-Off Corp. ("U-Need") -- were corporations founded several decades ago by Mr. Ferrante, who is 65-years-old.

The Government's central claim against the defendants, as summarized by its own preliminary statement in the 132-page complaint, is sweeping: "[T]he solid waste disposal industry in Nassau and Suffolk Counties...has been 'infiltrated, controlled, influenced, corrupted and run by organized crime...'" (*PSIA I*, 793 F. Supp. at 1121, citing the complaint.) The Government contends that the 44 corporate defendants involved in the Long Island solid waste disposal industry, and the individual defendants with interests in those corporations, each violated RICO §1962 (c).

Almost six years after the action was filed, a substantial majority of the originally named corporate and individual defendants remain as parties to the underlying litigation. Depositions and other forms of discovery have been in progress for years, under the supervision of a Magistrate Judge who, as recently as July 1994, commented on "the glacial flow of events in this case." No date has been set for the conclusion of pre-trial discovery. No trial date has been scheduled. The Government, as plaintiff, has never requested a closing date for pre-trial discovery or a trial date. No evidentiary hearings on any issue in this massive litigation have ever been held in the District Court.

Nor has the Governement ever amended its original June 1989 complaint, despite the fact that the District Court, in *PSIA I* -- the first extensive opinion in this litigation -- dismissed material portions of the complaint, including the with-prejudice dismissal of the Government's claims for money damages and the without-prejudice-dismissal of the RICO conspiracy counts of the complaint, *see PSIA I*, 793

F. Supp. at 1161, stressing that "the government lawyers who drafted this complaint have multiplied defendants, enterprises and predicate acts as though numbers were ends in themselves, and yet, unfortunately, those draftsmen have also attempted to present the elements of their claims in the most summary form. The result...is a complaint that is neither 'short' not 'plain.' Indeed, at all too many points, the result is a complaint as to which persons 'of common intelligence must necessarily guess at its meaning.'" *Id.* at 1121

None of the defendants -- including, of course, the petitioner -- has answered the complaint, which the District Court characterized as "this obscure pleading" (*id.*), because of an agreement among counsel, reached shortly after the rendition of *PSIA I* in June 1992, to defer answers or other responsive pleadings until after the Government has filed an amended complaint -- an event which has yet to ocur.

B. The District Court Proceedings Involving Petitioner

1. The Government's Motion

In April 1994, relying on a complaint the District Court in 1992 had characterized as "this obscure pleading" as to which "persons 'of the common intelligence must necessarily guess at its meaning,'" *PSIA I*, 793 F. Supp. at 1121, the Government moved for summary judgment against Mr. Ferrante alone. That motion was supported principally by a declaration of a Special Agent of the Federal Bureau of Investigation ("FBI") who, in addition to repeating the main theme of the Government's complaint -- the alleged control by organized crime of the Long Island carting industry through enforcement of a "property rights system" under which the corporate defendants allegedly do not compete with one another for customers -- asserted that Mr. Ferrante had committed, as a first RICO predicate offense, "extortion" under 18 U.S.C. §1951 in the early 1980s with

respect to two so-called "rebel carters," Jerry Kubecka and Robert Kubecka, and, as a second RICO predicate offense, "bribery" of scalehouse employees of the Town of Oyster Bay, New York, from 1982 through February 1985 by Mr. Ferrante's allegedly giving one of them a total of approximately $1,900 in cash and "bottles of liquor at Christmas time."

Moreover, the Special Agent's declaration asserted, as did the Government's legal memorandum in support of the motion, that Mr. Ferrante's innovcation of his Fifth Amendment Privilege against self-incrimination at his deposition in this case in response to questions regarding the alleged acts of "extortion" and "bribery" in the early 1980s, together with his invocation of the privilege as to other questions at his deposition, could be used against him to establish the alleged commission of the criminal acts as to which the privilege was asserted.

Finally, in an effort to establish that Mr. Ferrante not only committed the two predicate offenses of "extortion" against the Kubeckas in the early 1980s and "bribery" of the Oyster Bay scalehouse employees but that he also engaged in a "pattern of racketeering activity," the Special Agent asserted that Mr. Ferrante was a "principal 'bagman'" for organized crime and that he collected what the FBI agent characterized as cash "tribute" payments from the corporate defendants and the individual defendants. To support that accusation, the Government relied on the Special Agent's conclusory assertion that Mr. Ferrante was a "bagman" and Mr. Ferrante's invocation of his Fifth Amendment Privilege during his deposition when he was asked questions about his alleged collection of cash and transfers of cash to organized crime.

2. Petitioner's Opposition to The Motion

In opposing the Government's motion, petitioner came forward with opposition material challenging every facet of the claims against him. Through affidavits, transcripts of

deposition testimony, and other documents -- including the detailed affirmation of Mr. Ferrante's son, Joseph Ferrante, a long-time executive of Unique and U-Need[2] -- the opposition confronted each of the Government's contentions, from the broad allegations that the carting industry on Long Island has operated through a "property rights system" enforced by organized crime, through the specific assertion that Mr. Ferrante was a "bagman" for organized crime, to the charges that Mr. Ferrante had extorted the Kubeckas in the early 1980s and bribed an Oyster Bay scalehouse employee from 1982 through February 1985 with a total of $1,900 in cash and "bottles of liquor at Christmas time."

Among other things, petitioner's opposition material included extensive transcripts from deposition testimony in this case negating the Government's views (i) that organized crime controls the solid waste disposal industry on Lond Island, (ii) that a "property rights system" prohibits customers from changing carters, and (iii) that the defendants operate as a non-competitive carel. The opposition stressed that "every...defendant who has testified in this litigation has disputed the central contention of the Goverment -- its position... that there is a Luchese [organized crime] Family and that it has 'control over the Long Island [c]arting [i]ndustry...' "

As was the case with the Government's underlying contention of organized crime control over the carting industry, the opposition material also squarely refuted the next set of generalized claims in the Government's papers: that a "property rights system" dominates the industry,

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2. Since petitioner had asserted his Fifth Amendment Privilege against self-incrimination at his deposition, he did not personally submit an affidavit or affirmation in connection with his opposition to the motion.

precluding customers from firing a carter, and that the defendants operate as a cartel. As to the "property rights" component of the Government's claims, the opposition material demonstrated that "every witness who has testified" about the alleged system "has denied its existence, just as they have denied the existence of a cartel." More broadly, the opposition came forward with affidavits and deposition testimony contradicting the Government's portrayal of a solid waste disposal industry on Long Island dominated by organized crime and frozen in an anti-competitive atmosphere in which carting companies do not attempt to attract customers but simply keep "stops," as the Government alleged, "forever."

The opposition, in addition to rebutting the Government's broad claims of organized crime control of the industry, addressed in detail the specific claims raised against Mr. Ferrante: (i) his alleged role as a "bagman" for organized crime, (ii) his alleged involvement in the Kubecka episode of the early 1980s and the 1986 guilty plea he entered in a New York State Court to a single count of "coercion" under New York State law associated with that episode, and (iii) his alleged payment of approximately $1,900 in cash and liquor to Oyster Bay scalehouse employees.

As far as the "bagman" accusation is concerned, the opposition cited, without contradiction by the Government, the fact that "every other defendant who has testified and who has been asked about providing cash, extortion or 'tribute' payments to [Mr. Ferrante] has denied having done so."

Moreover, petitioner's opposition papers squarely dealt with Mr. Ferrante's plea of guilty, in October 1986, to a single felony count of "coercion in the first degree" in a New York State proceeding. Both the Government in its motion and the District Court in the October 1994 Order fastened on the plea as in itself conclusively establishing,

without more, federal extortion under 18 U.S.C. §1951, the first predicate act of alleged racketeering activity. As Joseph Ferrante explained in that portion of the opposition papers which addressed the guilty plea:

> . . . [T]here is no question that my father [before trial] pleaded guilty in October 1986 to Count Two of New York State Indictment No. 2626-83 (the "1983 Indictment"). . . . As I understand it, my father, as a consequence of his guilty plea, was convicted of Coercion in the First Degree under §135.65(a) of the New York Penal Law.
>
> Having lived through the period after my father was indicted and before he pleaded guilty, I can state that his decision to plead guilty was not made because he believed he had committed any crime but because his attorneys urged him to do so. At no point before he entered his guilty plea was my father advised that the claims in the 1983 Indictment to which he was pleading guilty could form the basis of the same Kubecka-related claims contained in the 1989 complaint in this RICO action. Had he known that by pleading guilty to the 1983 Indictment he would later face the contention made by the Government that his "guilty plea plainly establish[es] a Hobbs Act violation (*i.e.*, 18 U.S.C. §1951] in this civil RICO case" (*see* [Gov. Mem. at 8]), he would never have entered the plea.

Furthermore, as the opposition papers stressed, Jerry Kubecka, one of the alleged victims of Mr. Ferrante's conduct, had recently testified at a deposition in this case

and, during the course of that testimony, Mr. Kubecka was asked: "Is there anything that you recollect . . . about [Mr. Ferrante] that caused you or your companies harm in any way?" Mr. Kubecka's answer was: "Going back a few years before, I think he [Mr. Ferrante] offered to buy the route -- I think he spoke to my son. I remember, I recollect, I had no animosity either way with him. . . ." Of Mr. Ferrante, Mr. Kubecka also testified: "Never a problem that I know. . . ."

Finally, the opposition papers refuted the only other alleged predicate act, in addition to the Kubecka-related claim, on the basis of which the Government urged that Mr. Ferrante had violated RICO: his alleged "bribery" of Joseph Vittorio, the Oyster Bay scalehouse employee who, in 1993, had signed a declaration in which he contended that a substantial number of the individual defendants, including Mr. Ferrante, made cash payments to him a decade earlier.

* * *

In a cross-motion for a continuance under Fed. R. Civ. P. 56(f), Mr. Ferrante identified the more salient aspects of the open discovery, including (i) the continuation of the deposition of the FBI Special Agent whose April 1994 declaration formed the core of the Government's motion and whose deposition began in May 1994 but was not concluded as of the time when petitioner was required to oppose the Government's motion, and (ii) the taking of the depositions of the other individual defendants, a number of whom had already testified to facts which undercut the main theories of the Government's motion against Mr. Ferrante.

Particularly important was the need to continue the Special Agent's deposition. This was crucial because the Special Agent, at the May 1994 session of his deposition, had declined to answer literally dozens of questions about the complaint, about Mr. Ferrante and about other defendants by repeatedly invoking the words, "I have no non-privileged information." As the cross-motion stressed,

the Special Agent was questioned about the allegation of the complaint that "[m]embers and associates of organized crime families were and are directors, officers, employees and/or shareholders of various defendant carting companies. . . ." When asked whether petitioner was a member or associate of any organized crime family, the FBI agent responded: "I have no non-privileged information." Petitioner's request for further discovery was designed, at least in part, to provide him an opportunity to challenge the agent's refusal to answer this and other central questions.

The other open discovery issues specified in the cross-motion focused primarily on the fact that the depositions of fewer than half of the original 64 individual defendants had been conducted. This was important, the cross-motion explained, because every one of the defendants who had given testimony and who had been asked about the central themes of the Government's case had disputed the Government's allegations. Every defendant who testified and who had been asked whether he or a company with which he was affiliated gave cash or so-called "tribute" payments to Mr. Ferrante denied having done so. The other defendants also specifically and categorically denied the Government's claims regarding such central themes of the Government's case and the Ferrante motion as alleged "mob control" of the Long Island carting industry, "tribute payments" to organized crime, and the existence of a "cartel" and "property rights systems."

C. The October 1994 Order

In granting summary judgment against petitioner, the District Court entered the full injunctive relief requested by the Government, as well as the requested divestiture and disgorgment orders. The October 1994 Order repeatedly stressed Mr. Ferrante's invocation of his Fifth Amendment Privilege as a crucial basis for adjudicating him a racketeer

and entering injunctive, divestiture and disgorgment orders against him. Among other things, the District Court, describing as "disingenuous" Mr. Ferrante's position that further discovery, particularly of the FBI agent, was necessary (App. C, 39a), asserted: "Ferrante seeks to defend this action by obtaining testimony of others, while continuing to assert the Fifth Amendment privilege with respect to the underlying facts." (App. C, 39a).

The District Court specifically cited petitioner's invocation of the Fifth Amendment Privilege as a basis for determining all of the material issues against him. According to the District Court, which explicitly relied only on the FBI declaration and Mr. Ferrante's assertion of the privilege, petitioner was "an integral part of the carting industry and PSIA enterprises, operating as a 'bagman' and 'zone captain' for . . . the Luchese crime family. . . . Ferrante's role included policing the cartel's 'property rights system' and resolving disputes among carters. . . . Ferrante, invoking his privilege against self-incrimination, refused to answer questions. . . ." (App. C, 36a).

As the October 1994 Order repeatedly--and, we submit, incorrectly--asserted, "an adverse inference may be drawn in a civil RICO proceeding against a defendant who invokes the privilege against self-incrimination." (App. C, 34a). The drawing of that inference led the District Court to conclude that petitioner should be adjudicated, on a motion for summary judgment, a racketeer who had violated §1962(c) of RICO; it also led the District Court to enter, again on the basis of the summary judgment motion only, injunctive and equitable orders (i) barring petitioner "from engaging in any activities involving or connected with the collection, transportation or disposal of solid waste" and from "associating with any other defendant . . . for any commercial purpose," and (iii) requiring him "to divest his interests in the named enterprises and to disgorge the

proceeds derived from his unlawful conduct or from participation in the [e]nterprises. . . ."[3]

D. The Opinions and Order in the Second Circuit

Immediately after filing a notice of appeal from the October 1994 Order, petitioner moved in the Second Circuit for a stay of the order pending the outcome of the appeal and for an expedited appeal. A majority of the panel which heard petitioner's motion issued a January 11, 1995 opinion which denied the application for a stay, stressing that a "party seeking a stay of a lower court's order bears a difficult burden." *United States v. Private Sanitation Industry Association of Nassau/Suffolk, Inc., supra,* 44 F. 3d at 1084. (App. B, 8a).

In his detailed dissent from the majority's refusal to grant a stay, Judge Heaney stressed his belief "that Ferrante has met his burden of establishing a substantial possibility of success on appeal." 44 F. 3d at 1085, App. B, 10a. Responding to Mr. Ferrante's arguments in the District Court and in the stay motion that summary judgment -- without benefit of a trial -- was an inappropriate vehicle in which to adjudicate Mr. Ferrante a racketeer and to sanction

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3. Contrary to the explicit requirement of Fed. R. Civ. P. 65, the October 1994 Order did not itself identify the injunctive relief imposed on Mr. Ferrante. This description of the relief imposed by the District Court in its October 1994 Order is drawn from Judge Heaney's dissenting opinion, on January 11, 1995, in connection with Mr. Ferrante's motion to the Second Circuit for a stay of the October 1994 Order. *See United States v. Private Sanitation Industry Association of Nassau/Suffolk, Inc., supra,* 44 F. 3d at 1086-87.

him with sweeping penalties, Judge Heaney noted at the outset: "[T]he government's use of summary civil procedures to impose punitive sanctions for alleged criminal behavior represents a further erosion of citizens' protections[,] . . . particularly in light of RICO's wide application outside the bounds of organized crime." 44 F. 3d at 1085. For Judge Heaney, there was no "justif[ication]" for the "circumvention of the judiciary's duty to put the government to its proofs: [i]n a quasi-criminal RICO action, the government should be required to establish each element of liability before a trier of fact." *Id.*

Drawing on Supreme Court precedents such as *United States v. Halper,* 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed. 2d 487 (1989), cited by Mr. Ferrante in his opposition papers in the District Court and in support of his stay motion, Judge Heaney determined that the litigation against Mr. Ferrante was "quasi-criminal" in "nature," 44 F. 3d at 1085, and that, as a "consequence of [that] quasi-criminality," *id.* at 1089, "the conventional standards for summary judgment [under *Celotex v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed. 2d 265 (1986), and *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)] provide inadequate protection to civil RICO defendants. The prospect of punitive liability in a quasi-criminal action demands that the court afford the defendant something akin to a presumption of innocence. . . . The nature of quasi-criminal remedies requires that trial courts refrain from engaging in pre-trial weighing of evidence where the defendant has come forward with assertions which, if credited by the trier of fact, would

absolve the defendant of liability." 44 F. 3d at 1089.[4] Indeed, Judge Heaney found that Mr. Ferrante's detailed evidentiary opposition to the summary judgment motion came forward with a sufficiently compelling set of facts which, "if credited by the trier of fact [at trial], would absolve the defendant of liability." *Id.*

* * *

Ultimately, in its unpublished opinion dated January 23, 1995, the Second Circuit affirmed the District Court's October 1994 Order. (App. A, 2a). The Second Circuit commented, among other things, that Mr. Ferrante had "asserted his Fifth Amendment privilege" and that the District Court was permitted to "draw[] adverse inference[s] from Ferrante's failure to testify in this civil RICO proceeding, notwithstanding the fact that the Government, rather than a private party, is the plaintiff." (App. A, 3a).

In its order, the Second Circuit also wrote that (i) Mr. Ferrante's 1986 guilty plea in a New York State court to "coercion" under New York law could be given full offensive collateral estoppel effect in this action, thereby entitling the United States, without more, to establish federal "extortion" with respect to the episode in the early 1980s regarding the Kubeckas as a first RICO predicate against Mr. Ferrante and (ii) the Government had

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4. Judge Heaney succinctly summarized why the litigation as against Mr. Ferrante and its consequences for him "render[ed] the action quasi-criminal." *Id.* at 1087. "If required to divest his interest in Unique Sanitation Co. and U-Need-A-Roll-Off Corp. and to remain permanently out of the industry, Ferrante, like a disbarred attorney, will lose the only source of income he has known, at least part of which the government concedes may be legitimate. Moreover, Ferrante faces being branded as a 'racketeer,' just as the juvenile in *Gault* [*In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L.Ed. 2d 527 (1967)] faced the label 'delinquent.'" *Id.*

established, on the summary judgment motion, that Mr. Ferrante engaged in a pattern of racketeering activity because the "threats to rival carters and the bribe payments were related to Ferrante's role in the Long Island carting industry, and to the furtherance of the Lucchese Crime Family's control of that industry, because they ensured that carters, and organized crime, would receive competitive advantages." (App. A, 3a-4a). The order in addition sustained in full all of the injunctive relief, as well as the divestiture and disgorgement orders, entered by the District Court. (App. A, 4a).

Reasons for Granting the Writ

THE SECOND CIRCUIT'S SUMMARY OPINION AFFIRMED THE DISTRICT COURT'S IMPERMISSIBLE DEPARTURE FROM STANDARDS WHICH SHOULD APPLY TO THE USE OF SUMMARY JUDGMENT IN CIVIL RACKETEERING LITIGATION AND THIS COURT SHOULD GRANT THE WRIT IN ORDER TO RESOLVE IMPORTANT QUESTIONS REGARDING THE CONSTITUTIONAL AND PROCEDURAL RIGHTS OF DEFENDANTS IN ACTIONS BROUGHT UNDER RICO'S CIVIL PROVISIONS, PARTICULARLY WHERE THE UNITED STATES IS THE PLAINTIFF AND SEEKS PUNITIVE, QUASI-CRIMINAL REMEDIES

This Court has never had the opportunity, in the context of a civil racketeering litigation brought by the United States, to evaluate the constitutional, procedural and statutory guidelines which should apply where, as here, the Government has used the summary judgment procedures of the Federal Rules to achieve results which are, by any reasonable standard, drastic. As a consequence of the

District Court's order and the Second Circuit's summary affirmance, Mr. Ferrante, at the age of 65, has been publicly adjudicated a racketeer, has been totally precluded from any involvement in the corporations he founded decades ago, has been expelled from any role in an industry in which he has worked all of his adult life, and has been ordered to "divest" all of his interests in his own corporations and in nebulous "carting industry" enterprises and to "disgorge" the proceeds from allegedly illegal activity.

All of these sanctions have, of course, been imposed on Mr. Ferrante without a trial. In the final analysis, the District Court acted on the basis of a declaration from an FBI agent who pronounced, in writing, his views on issues which clearly should only have been determined as a result of a trial: that organized crime has dominated the solid waste disposal on Long Island for decades, that the corporate defendants operate as a "cartel" which enforces a "property rights system," that Mr. Ferrante has for years functioned as a "bagman" for organized crime by collecting "tribute" payments from other defendants, and that Mr. Ferrante "extorted" two "rebel carters" in the early 1980s and paid "bribes" to an Oyster Bay scalehouse employee of approximately $1,900 in cash and "bottles of liquor at Christmas time" in the early to mid-1980s.

None of these accusations was vetted through a trial process. All of them were accepted as "fact" in the summary judgment context by the District Court despite Mr. Ferrante's detailed submission of opposing affidavits and deposition testimony from defendants in this case explicitly contradicting every facet of the Government's claims, from the broad accusation that organized crime controls the solid waste disposal industry on Long Island and that the corporate and individual defendants operate a Long Island cartel through enforcement of a "property rights system," to the more specific allegations against Mr. Ferrante that he coerced two carters in the early 1980s, that he was a

"bagman" for organized crime, and that he "bribed" Oyster Bay scalehouse employees by allegedly giving them $1,900 in cash and liquor bottles over a two-and-one-half year period in the early to mid-1980s.

The District Court justified the drastic sanctions imposed on Mr. Ferrante -- and accepted, without any critical evaluation, the Government's version of events -- primarily on the basis of Mr. Ferrante's invocation of the Fifth Amendment Privilege against self-incrimination in the discovery proceedings in the litigation.

This is a stunning and grave approach. As a result of the proceedings in the District Court and the Second Circuit, the United States now has a chilling license under the RICO statute: it can bring what it labels a civil action under the racketeering statute -- an action which always implicates criminal concerns since the language of RICO which creates civil liability also creates criminal liability -- and then, in the event a defendant elects to assert his Fifth Amendment Privilege, the Government can present FBI affidavits and other written declarations asserting as fact issues that are clearly subject to dispute (such as whether a person is a "bagman" for an organized crime family) and claim that the alleged "facts" are conclusively established because the defendant against whom the statements are asserted invoked his privilege against self-incrimination.

* * *

In this context, this petition presents the Court with an important opportunity on a record which could not be more clearly framed (i) to evaluate the drawing of adverse inferences against a defendant who invokes his privilege against self-incrimination in a RICO action nominally brought under the civil provisions of the statute by the United States, and (ii) to articulate the standards which apply to summary judgment motions under Fed. R. Civ. P. 56 in Governmental RICO actions where the sanctions sought are quasi-criminal in nature and consequence.

We briefly summarize below the principal issues as to which Mr. Ferrante seeks review:

The Privilege Against Self-Incrimination In The Context of Civil RICO Actions Brought by the United States

Both the District Court in its October 1994 Order and the Second Circuit in its summary affirmance accepted as Biblical scripture the concept that this Court, in *Baxter v. Palmigiano,* 425 U.S. 308, 96 S. Ct. 1551, 47 L.Ed. 2d 810 (1976), laid down a rule that a defendant's invocation of his Fifth Amendment Privilege in any civil RICO case allows the trier of fact to draw an adverse inference against the invoking defendant on all factual issues as to which he or she has asserted the privilege. As the District Court framed its view of *Baxter,* "an adverse inference may be drawn in a civil RICO proceeding against a defendant who invokes the privilege against self-incrimination." (App. C, 34a). The Second Circuit's summary affirmance not only repeated that view but asserted that nothing restricted the drawing of the adverse inference in cases in which the Government was the plaintiff: "The District Court could . . . draw[] an adverse inference from Ferrante's failure to testify in this civil RICO proceeding, notwithstanding the fact that the Government, rather than a private party, is the plaintiff." (App. A, 3a).

Bluntly described, the approach of the District Court and the Second Circuit to the Fifth Amendment issue has all the hallmarks of a Star Chamber proceeding. In effect, because an FBI agent asserted in an affidavit that Mr. Ferrante was a "bagman" and Mr. Ferrante invoked his Fifth Amendment Privilege on questions as to whether he had ever collected so-called "tribute" payments, the District Court concluded, without more and on a motion for summary judgment, that he was a "bagman." Similarly, because a former scalehouse employee of the Town of Oyster Bay -- a person, incidentally, who was at one time a

defendant in this litigation -- signed a declaration in 1993 which alleged that Mr. Ferrante had given him $1,900 in cash and liquor bottles a decade earlier, and because Mr. Ferrante, when asked whether he had "bribed" that employee, asserted the privilege, the District Court and the Second Circuit determined that petitioner had in fact "bribed" Oyster Bay scalehouse employees.

Contrary to the view of the District Court and the Second Circuit, nothing in this Court's decision in *Baxter* authorizes the use of adverse inferences in civil RICO actions as a consequence of a defendant's invocation of his Constitutional privilege. *First, Baxter* did not deal with the federal racketeering statute and, in fact, at the time *Baxter* was decided in 1976, this Court had never evaluated any significant civil issue under the then relatively new RICO statute. Nor did *Baxter* deal with any of those relatively rare and unique statutes which, like RICO, use precisely the same language to create both criminal and civil liability.

Second, and more important, is the crucial limitation placed on *Baxter* by Justice Brennan's concurring and dissenting opinion in *Baxter* itself. As Justice Brennan emphasized: "[P]ermitting an adverse inference in some civil cases violates the Fifth Amendment . . . where a *government official* puts questions to an individual with the knowledge that the answers might tend to incriminate him." *Baxter,* 425 U.S. at 335, 96 S. Ct. at 1565-66; emphasis in original. According to Justice Brennan, "[s]uch a distinction" between permitting the drawing of an adverse inference "in civil cases involving only private parties" and not allowing the drawing of the inference in civil cases where the Government is a party "is mandated by one of the fundamental purposes of the Fifth Amendment: to preserve our adversary system . . . by preventing *the government* from circumventing that system by abusing its powers." *Baxter,* 425 U.S. at 335, 96 S. Ct. at 1566; emphasis in original. The grounds for not allowing the adverse inference

in cases such as this one were summarized by Justice Brennan in *Baxter* as follows:

> In a civil suit involving only private parties, no party brings to the battle the awesome powers of the government, and therefore to permit an adverse inference to be drawn from the exercise of the privilege does not implicate the policy considerations underlying the privilege. But where the government "deliberately seeks" the answers to incriminatory questions, allowing it to benefit from the exercise of the privilege aids, indeed encourages, governmental circumvention of our adversary system. [*Baxter,* 425 U.S. at 336, 96 S. Ct. at 1566.]

Justice Brennan's clearly articulated concerns in *Baxter* apply fully to Mr. Ferrante's situation and the Government's use against him of his exercise of his Constitutional right not to incriminate himself. To paraphrase Justice Brennan, the Government "deliberately" sought (*id.*) the "answers to incriminatory questions" -- such as "Did you extort?" "Did you bribe?" "Were you a bagman for the Mafia?" -- and then the District Court and the Second Circuit "allow[ed]" the Government to "benefit from the exercise of the privilege. . . ." *Id.* As Justice Brennan put it in *Baxter,* this methodology "aids, indeed encourages, governmental circumvention of our adversary system." *Id.*

Moreover, the Government's circumvention of the "adversary system" has another dimension which this Court can and should take the opportunity to review. This relates to the fact that the courts below accorded full offensive collateral estoppel effect to Mr. Ferrante's 1986 New York State guilty plea to the New York offense of "coercion" when both the District Court and the Second Circuit

accepted that plea, without more, as establishing Mr. Ferrante's alleged first predicate act of federal extortion for RICO purposes.[5] Thus, the Government, which drafted its complaint to put in issue a series of events taking place over a two-year period in the early 1980s involving the Kubeckas (the two so-called "rebel carters"), was able to bypass completely the need to litigate an array of facts its complaint had placed in issue simply by pointing to a one-sentence statement Mr. Ferrante had made in the New York State court plea allocution in 1986.

Not only was this a circumvention of the "adversary system" similar to that Justice Brennan described in *Baxter,* it was also a plainly unfair violation of an explicit provision of RICO itself and of the general principles this Court has applied to the circumstances under which offensive collateral estoppel can be used, as delineated in *Parklane Hosiery Co., Inc. v. Shore,* 439 U.S. 322, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979). *First,* §1964(d) of RICO explicitly limits estoppel to situations in which the United States, not a state, has obtained a prior criminal conviction, and then only in a prior criminal action brought by the United States under RICO. *Second,* and more broadly, the factors articulated by this Court in *Parklane* governing the circumstances in which offensive collateral estoppel should, or should not, be utilized weighed in favor of not permitting the 1986 state guilty plea to determine the outcome of this litigation.

In effect, then, the fact that the courts below sanctioned the Government's circumvention of the "adversary system" by their treatment of both Mr. Ferrante's invocation of his Constitutional privilege and the use of the

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5. The Government conceded in the District Court that the New York offense of coercion was not a predicate act of racketeering within the meaning of the definitions in RICO §1961.

1986 state plea raise important Fifth Amendment issues, under both the self-incrimination and due process clauses of the amendment, which this Court should review, particularly in the context of summary judgment procedures in civil RICO litigation.

Additional Fifth Amendment Due Process and Eighth Amendment Concerns Raised by the Use of Summary Procedures in RICO Actions

Judge Heaney's dissent from the Second Circuit's refusal to grant a stay of the October 1994 Order underscores yet another important facet of this case which merits review by this Court. As Mr. Ferrante had urged in the District Court and on appeal, the nature of this litigation in general, the punishment to which Mr. Ferrante was subjected by the courts below, and the procedural context in which those punishments were imposed, all raised concerns which Judge Heaney summarized as follows:

> [T]he government's use of summary judgment procedures to impose punitive sanctions for alleged criminal behavior represents a further erosion of citizens' protections . . . particularly in light of RICO's wide application outside the bounds of organized crime. My conviction that Ferrante need not be denied his day in court is reinforced by the fact that the prosecution would suffer no appreciable harm if it were required . . . to bring him individually to trial. . . . In a quasi-criminal RICO action, the government should be required to establish each element of liability before a trier of fact. [44 F. 3d at 1085.]

Briefly described, the important additional issues raised by Mr. Ferrante in the courts below and delineated by Judge Heaney in his dissent relate to (i) the "quasi-criminal nature of this action" (*id.*), and (ii) the "consequence of quasi-criminality" (*id.*) in the specific context of a civil RICO action brought by the Government where, as here, the Government seeks to impose drastic RICO liability on the basis of a motion for summary judgment under Fed. R. Civ. P. 56. The core constitutional issues raised by this case relate, as Judge Heaney emphasized, to (i) Mr. Ferrante's Fifth Amendment due process rights -- in effect, his right to a trial before he can be made to suffer the "punitive measures" and "punishment" (44 F. 3d at 1088) visited on him by the courts below on a summary judgment motion only -- and (ii) the Eighth Amendment concerns identified by Mr. Ferrante below and by Judge Heaney under the Excessive Fines Clause of that amendment.

Conclusion

For all the foregoing reasons, petitioner Nicholas Ferrante respectfully requests that certiorari be granted.

Dated: New York, New York
April 21, 1995

Respectfully submitted,

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APPENDIX A
ORDER OF THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT DATED JANUARY 23, 1995

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of January, one thousand nine hundred and ninety-five.

PRESENT: HONORABLE JON O. NEWMAN,
Chief Judge.
HONORABLE ROGER J. MINER,
Circuit Judge,
HONORABLE LEWIS A. KAPLAN,
District Judge.

UNITED STATES OF AMERICA,
Appellee,

v.

NICHOLAS FERRANTE,
Defendant-Appellant.

ORDER

Appeal from the United States District Court for the Eastern District of New York (I. Leo Glasser, Judge).

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York and was argued by counsel.

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*Of the United States District Court for the Southern District of New York, sitting by designation.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of the District Court be and it hereby is AFFIRMED.

Nicholas Ferrante appeals the October 13, 1994, order of the District Court granting the Government's motion for summary judgment against him for controlling Long Island's carting industry in violation of the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §1961 *et seq.* ("RICO"). The order enjoins Ferrante from various activities, including participating in the carting industry and commercially associating with members of organized crime or with other defendants in this case. By order of November 29, 1994, a panel of this Court denied Ferrante's motion for a stay of the injunctive relief but expedited this appeal.

Ferrante contends that: (1) the Government failed to establish the commission of two racketeering acts; (2) the evidence did not show that Ferrante had engaged in a pattern of racketeering activity or participated in the control of an enterprise; (3) the District Court abused its discretion in denying Ferrante's request for a continuance under Fed. R. Civ. P. 56(f) to conduct additional discovery; and (4) the District Court failed to consider the appropriate scope of the injunction. These claims are meritless.

(1) The Government established the requisite two racketeering acts. Ferrante's guilty plea in state court to coercion in the first degree conclusively showed that he had engaged in conduct indictable under the Hobbs Act, 18 U.S.C. §1951, and thus had committed one predicate racketeering act. *See* 18 U.S.C. §1961(1)(B). The Hobbs Act prohibits obstruction of interstate commerce through threats of violence to persons or property. Ferrante's admission in his plea allocution to having used threats to "induc[e two rival carters] to refrain from . . . soliciting certain carting customers" falls squarely within the Hobbs Act. *See United States v. Tropiano*, 418 F.2d 1069, 1075

(2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970). Ferrante had a full and fair opportunity to litigate in state court, and is now precluded from relitigating the facts underlying his plea. *See United States v. Private Sanitation Industry Ass'n*, 811 F. Supp. 808, 813-14 (E.D.N.Y. 1992), *aff'd*, 995 F.2d 375 (2d Cir. 1993) ("*PSIA II*").

The Government also established that Ferrante had repeatedly committed the state crime of second degree bribery, which is punishable by more than one year's imprisonment and thus is a RICO predicate. *See* 18 U.S.C. §1961(1)(A). The evidence showed that Ferrante had bribed employees of the Oyster Bay dump with the understanding that they would improperly assist him in reducing the amount of money his companies were required to pay to the Town for use of the refuse disposal services. Ferrante did not refute this evidence, but asserted his Fifth Amendment privilege and submitted only an affidavit of his son and co-defendant that does not attest to personal knowledge of specific facts showing a genuine issue for trial. The District Court could also have drawn an adverse inference from Ferrante's failure to testify in this civil RICO proceeding, notwithstanding the fact that the Government, rather than a private party, is the plaintiff. *See PSIA II*, 995 F.2d at 377; *United States v. Ianniello*, 824 F.2d 203, 208 (2d Cir. 1987).

(2) We similarly reject Ferrante's challenge with respect to the "pattern" and "participation" elements of RICO liability. To prove a pattern, the Government must show that the racketeering predicates are related, and that they amount to, or pose a threat of, continued criminal activity. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989). The threats to rival carters and the bribe payments were related to Ferrante's role in the Long Island carting industry, and to the furtherance of the Lucchese Crime Family's control of that industry, because they ensured that carters, and organized crime, would

receive competitive advantages. Moreover, these predicate acts were committed over a substantial, closed period of time and embodied a threat to an industry that has been dominated by organized crime.

The evidence also showed that Ferrante had "participated" in the carting industry and Private Sanitation Industry Association enterprises within the meaning of Section 1962(c), because he had "some part in directing [their] affairs," *Reves v. Ernst & Young*, 113 S. Ct. 1163, 1170 (1993). Ferrante was not merely a member but an integral part of these enterprises, operating as a "bagman" and "zone captain" for the Lucchese Crime Family. His role included policing the carting industry's "property rights" system and resolving disputes among carters. *See also id.* at 1173 (enterprise can be "operated" by "lower-rung participants in the enterprise who are under the direction of upper management").

(3) The District Court did not abuse its discretion in denying Ferrante a continuance to depose a number of Government witnesses. Ferrante had personal knowledge of the facts that he purportedly sought to ascertain through further discovery, *see PSIA II*, 811 F. Supp. at 817-18, and he never described in specific terms evidence that might be forthcoming and would demonstrate the existence of a genuine issue for trial, *see id.*, 995 F.2d at 377.

(4) Finally, the District Court evaluated the scope of the injunctive relief requested by the Government, and concluded that such relief was appropriate for the reasons set forth in *PSIA II*, 811 F. Supp. at 818, including the interest in eradicating corruption in the Long Island carting industry. In *PSIA II*, we upheld the District Court's award of similar injunctive relief based on activities that were substantially similar to those on which Ferrante's RICO violations are based. *Id.*, 995 F.2d at 377.

s/ Jon O. Newman, Chief Judge.
s/ Roger J. Miner
s/ Lewis A. Kaplan, Circuit Judges

APPENDIX B
OPINION OF THE SECOND CIRCUIT DATED JANUARY 11, 1995 DENYING PETITIONER'S MOTION FOR A STAY PENDING APPEAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. _____ -- August Term, 1994
(Argued: November 29, 1994 Decided: November 30, 1994
Filed: JAN 11 1995).
Docket No. 94-6278

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

-vs.-

PRIVATE SANITATION INDUSTRY ASSOCIATION OF NASSAU/SUFFOLK, INC., *et al.*,
Defendants,

NICHOLAS FERRANTE,
Defendant-Appellant.

Before: MAHONEY, McLAUGHLIN, and HEANEY,*
Circuit Judges.

Motion by defendant-appellant Nicholas Ferrante for a stay pending appeal and an expedited appeal of a judgment entered October 18, 1994 in the United States District Court for the Eastern District of New York, I. Leo Glasser, *Judge*, that granted summary judgment and injunctive relief in favor of the United States on a civil complaint alleging a

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* The Hon. Gerald W. Heaney, of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 *et seq.* The motion for a stay is denied; the motion for an expedited appeal is granted. Judge Heaney dissents in a separate opinion.

CHRISTOPHER H. LEHMAN, Assistant United States Attorney for the Eastern District of New York, Brooklyn, New York (Zachary Carter, United States Attorney for the Eastern District of New York, Brooklyn, New York, of counsel), *for Plaintiff-Appellee.*

PAUL A. BATISTA, New York, New York, *for Defendant-Appellant.*

MAHONEY, Circuit Judge:

Defendant-appellant Nicholas Ferrante moves this court for a stay pending appeal and an expedited appeal of a judgment entered October 18, 1994 in the United States District Court for the Eastern District of New York, I. Leo Glasser, *Judge,* that granted summary judgment and injunctive relief in favor of the United States on a civil complaint alleging a violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1961 *et seq.* On November 30, 1994, we denied the motion for a stay and granted the motion for an expedited appeal, indicating that this opinion supporting our decision would follow.

Ferrante is one of many defendants, including various organized crime families, labor unions, and private sanitation companies, named in a complaint alleging a massive conspiracy to control the solid waste disposal industry on Long Island through the use and threatened use of force in violation of RICO. *See United States v. Private Sanitation Indus. Ass'n.,* 793 F. Supp. 1114, 1121-23 (E.D.N.Y. 1992) (describing alleged conspiracy in detail).

This appeal stems from the district court's grant of

summary judgment against Ferrante. *See United States v. Private Sanitation Indus. Ass'n,* No. CV-89-1848, slip op. (E.D.N.Y. 1992) (describing alleged conspiracy in detail).

This appeal stems from the district court's grant of summary judgment against Ferrante. *See United States v. Private Sanitation Indus. Ass'n,* No. CV-89-1848, slip op. (E.D.N.Y. October 13, 1994). Ferrante had pled guilty in the Supreme Court of the State of New York to coercion in the first degree, in violation of New York Penal Law §135.65(1), for threatening certain private contractors with damage to their property if they bid for waste disposal work. *Id.* at 2-3. The district court held that the conduct underlying this conviction, as established in Ferrante's plea allocution, was clearly indictable under the Hobbs Act, 18 U.S.C. §1951, and was therefore a RICO predicate act under 18 U.S.C. §1961(1)(B). Slip op. at 9-10.

In addition, the government alleged that Ferrante had bribed officials at the Oyster Bay dump in order to receive a reduction in the amount of money that his companies were required to pay for use of the town's refuse disposal services. *Id.* at 10-11. The government submitted three affidavits by former Oyster Bay employees in support of this claim. *Id.* at 11. Ferrante's only response was an affidavit by his son that to the best of the son's knowledge, Ferrante had not paid any bribes. Because this statement was not based upon personal knowledge, it did not suffice to create an issue of fact precluding summary judgment. *See Gatling v. Atlantic Richfield Co.*, 577 F.2d 185, 188 (2d Cir.) (per curiam), *cert. denied,* 439 U.S. 861 (1978); *cf. Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 643 (2d Cir. 1988) (motion for summary judgment must be supported by affidavit based upon personal knowledge); *United States v. Bosurgi,* 530 F.2d 1105, 1111 (2d Cir. 1976) (same). Further, Ferrante asserted his Fifth Amendment privilege against self-incrimination in response to deposition questions concerning these alleged bribe

payments. *Id.* The district court found, based upon this invocation and the essentially uncontroverted evidence submitted by the government, that Ferrante had clearly committed bribery in violation of New York State Penal Law §200.00, a RICO predicate act under 18 U.S.C. §1961(1)(A). Slip op. at 11-12.

Finally, the district found no material dispute of fact that these acts were sufficiently related to constitute a pattern, *id.* at 12-13, and that Ferrante was sufficiently involved in the Private Sanitation Industry Association, the RICO enterprise, to be subject to RICO liability. *Id.* at 13-15.

Having determined that the government was entitled to summary judgment with respect to liability, the court enjoined Ferrante from participating in the waste disposal business, violating RICO, and associating with his codefendants for any commercial purpose, and ordered him to divest his interests in various enterprises and to disgorge the proceeds derived from his unlawful conduct into a court-administered fund. *Id.* at 15-17. Ferrante appealed and filed the motion to which this opinion responds.

A party seeking a stay of a lower court's order bears a difficult burden. We consider (1) whether the movant will suffer irreparable injury absent a stay; (2) whether a party will suffer substantial injury if the stay is granted; (3) whether the movant has established a substantial possibility, which need not be a likelihood, of appellate success; and (4) the public interest. *Hirschfeld v. Board of Elections,* 984 F.2d 35, 39 (2d Cir. 1992) (collecting cases).

There is no basis for a stay in this case. Ferrante points to no material issue of fact to establish a substantial possibility that the district court's summary judgment regarding liability will be reversed on appeal. Indeed, we affirmed the district court's grant of summary judgment and imposition of identical injunctive relief with respect to Ferrante's codefendant, Salvatore Avellino, Jr., in *United*

States v. Private Sanitation Industry Association, 995 F.2d 375, 377-78 (2d Cir. 1993) (per curiam). *See also United States v. Private Sanitation Indus. Ass'n*, 811 F. Supp. 808, 818 (E.D.N.Y. 1992) (addressing constitutionality of broad injunctive relief and specifying terms of injunctive relief against Avellino), *aff'd*, 995 F.2d 375 (2d Cir. 1993) (per curiam). Like Ferrante, Avellino's RICO liability was based upon extortion and bribery in connection with Avellino's trash-hauling companies. *Id.* at 810-11. Moreover, once liability is established, the trial court has broad discretion in fashioning relief, *see* 995 F.2d at 377, and is explicitly authorized to "order[] any person to divest himself of any interest, direct or indirect, in any enterprise." 18 U.S.C. §1964(a); *see also United States v. Private Sanitation Indus. Ass'n*, 793 F. Supp. at 1150-52 (discussing divestiture and disgorgement as RICO remedies).

In deciding to deny Ferrante's motion for a stay, we have also considered the other factors pertinent to the issue whether to grant a stay. While Ferrante may well suffer irreparable harm from the divestiture of his companies, the interests of the government and the public in terminating the control of trash handling on Long Island by criminal conspirators weigh heavily against granting a stay. Because of the scope of the relief ordered against Ferrante, however, his appeal will be heard on an expedited basis, and arrangements have been made by the parties with staff counsel regarding the details of that expedition. *See* order entered November 29, 1994.

HEANEY, Senior Circuit Judge, dissenting:

In my view, the quasi-criminal nature of the remedies sought by the government in this RICO action render summary judgment an inappropiate means by which to impose liability on Ferrante. I recognize, however, that this circuit has held to the contrary in *United States v. Private Sanitation Indus. Ass'n*, 995 F.2d 375 (2d Cir. 1993) ("*Avellino*"). I recognize that we are bound by that holding, but believe that this case can and should be distinguished from *Avellino*. While I fully accept the federal government's compelling interest in purging the Long Island private sanitation industry of organized crime, I also believe that Ferrante has met his burden of establishing a substantial possibility of success on appeal. *Hirschfeld v. Board of Elections*, 984 F.2d 35, 39 (2d Cir. 1992). Consequently, I would concur in a stay designed both to preserve Ferrante's assets for possible future disgorgement and disinvestment proceedings pending the resolution of Ferrante's appeal.

As to the appropriateness of summary judgment, I must emphasize at the outset that this is a close case. I can find little fault in the majority's identification and use of relevant case law. Nevertheless, the government's use of summary civil procedures to impose punitive sanctions for alleged criminal behavior represents a further erosion of citizens' protections in criminal proceedings, particularly in light of RICO's wide applicability outside the bounds of organized crime. My conviction that Ferrante need not be denied his day in court is reinforced by the fact that the prosecution would suffer no appreciable harm if it were required to sever Ferrante from his co-defendants and bring him individually to trial. The evident strength of the government's case against Ferrante cannot justify the circumvention of the judiciary's duty to put the government to its proofs. In a quasi-criminal RICO action, the government should be required to establish each element of liability before a trier of fact.

I. THE QUASI-CRIMINAL NATURE OF THIS ACTION

The Supreme Court has prescribed a highly deferential test to determine when an apparently civil statutory penalty is, in fact, criminal:

> First, we... set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. Second, where Congress has indicated an intention to establish a civil penalty, we... inquire [] further whether the statutory scheme was so punitive in purpose or effect as to negate that intention...

United States v. Ward, 448 U.S. 242, 248-49 (1980). Once determined to be criminal, actions to enforce such a statute must be accompanied by the full range of constitutional protections for criminal defendants, including the Fourth, Fifth, and Sixth Amendments. The test for quasi-criminality, however, is considerably less rigid and less deferential. A finding of quasi-criminality requires that only certain protections be imported from the criminal law in order to guarantee that due process is satisfied.

As set forth below, the touchstone of quasi-criminality is punishment.[1] Government-prosecuted civil RICO actions in

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1. It does not follow that the availability of punitive damages in a given civil action renders it quasi-criminal in nature. Although the line between tort and crime is ambiguous, it does nevertheless exist. Punitive damages obviously constitute punishment, but the underlying acts for which such awards are levied sound in tort, and not under the criminal law. It may safely be said that punitive damage awards punish and deter tortious behavior, while quasi-criminal civil remedies punish and deter criminal behavior.

which the remedies go beyond rough compensation must be considered quasi-criminal.[2] As the Supreme Court has noted , "the labels 'criminal' and 'civil' are not of paramount importance...[for] [i]t is commonly understood that civil proceedings may advance punitive as well as remedial goals." *United States v. Halper*, 490 U.S. 435, 447 (1990). "[T]he Supreme Court has in recent years eschewed the rigid labels of 'civil' or 'criminal' when examining constitutional interests." *United States v. On Leong Chinese Merchants Ass'n Bldg.*, 918 F.2d 1289, 1299 (7th Cir. 1990) (Cudahy, J., concurring). In *Halper*, the Court held that "the detemination whether a given civil sanction that cannot be fairly said to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." Id.

The Supreme Court has identified two types of proceedings as quasi-criminal: first, those actions in which a defendant faces loss of liberty or livelihood; second, those imposing a civil penalty rising from the commission of a criminal offense. See Elizabeth A. Fuerstman, *Trying (Quasi) Criminal Cases in Civil Courts: The Need for Constitutional Safeguards in Civil RICO Litigation*, 24 Colum. J. L. & Soc. Probs. 169 (1991). Put together, these decisions establish that the imposition of punishment for criminal activity segregates quasi-criminal from garden-variety civil causes of action. Both lines of cases fortify the conclusion that the present action is quasi-criminal.

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2. I agree with *United States v. Cappetto*, 502 F.2d 1351, 1357 (7th Cir. 1974), that a civil proceeding "is not rendered criminal in character by the fact that the acts also are punishable as crimes." Rather, it is the actual punitive nature of the requested relief in a given case that will render a civil RICO action quasi-criminal.

The first line follows from *In re Gault*, 387 U.S. 1 (1966), in which the Supreme Court held that due process protections apply to juvenile deliquency proceedings. The Court held that "a) proceeding where the issue is whether the child will be found to be 'deliquent' and subjected to the loss of liberty for years as comparable in seriousness to a felony prosecution." Id. at 36. Due process, the Court found, entitled the allegedly deliquent child to be notified of the charges against him and of his right to be represented by counsel; to assert the privilege against self-incrimination; and to confront and cross-examine witnesses. Similarly, in *In re Ruffalo*, 390 U.S. 544, 550 (1968), the Supreme Court held that because "[d]isbarment, designed to protect the pubilc, is a punishment or penalty imposed on the lawyer," the accused lawyer "is accordingly entitled to procedual due process..." The Court characterized disbarment actions as "adversary proceedings of a quasi-criminal nature." Id. at 551. The Second Circuit has expanded upon *Ruffalo*, explaining that "a court's disciplinary proceeding against a member of its bar is comparable to a criminal rather than to a civil proceeding." *Erdmann v. Stevens*, 458 F.2d 1205, 1209 (2d Cir. 1972). Central to the reasoning in *Erdmann* was the court's acknowlegment that disbarment is punitive in nature: "[F]or most attorneys the license to pratice law represents their livelihood, loss of which may be greater punishment than a monetary fine." Id. at 1210.

In the case before us, it is clear that Ferrante faces the loss of his livelihood. The government seeks an order

> enjoining Nicholas Ferrante: (1) from engaging in any activities involving or connected with the collection, transportation or disposal of sold waste...(3) from participating in any of the affairs of any trade waste association, and from participating in any of the affairs of any of the Trust Funds of

> Local 813 or any other union , and (4) from associating with any other defendant or any member or associate of organized crime for any commerical purpose. In addition, it is requested that he be ordered to divest his interests in the named enterprises and to disgorge the proceeds derived from his unlawful conduct or from participation in the Enterprises into a Court-administered fund to be used for the Monitorship of the carting industry of Lond Island... in an amount to be determined after an inquest.

Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment as Against Nicholas Ferrante at 2-3. If required to divest his interests in Unique Sanitation Co. and U-Need-A-Roll-Off Corp. and to remain permanently out of the industry, Ferrante, like a disbarred attorney, will lose the only source of income he has known, at least part of which the government concedes may be legitimate. Moreover, Ferrante faces being branded as a "racketeer", just as the juvenile in *Gault* faced the label "delinquent." Thus, *Gault*, *Ruffalo*, and their progeny suggest that the relief sought by the government in this case renders the action quasi-criminal.

Beginning with *Boyd v. United States*, 116 U.S. 616 (1881), the second line of cases isolates certain varieties of civil forfeitures as quasi-criminal. In *Boyd*, the Court held that "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, although they may be civil in form, are in their nature criminal... [S]uits for penalties and forfeitures, incurred by the commission of offenses against the law, are of this quasi criminal nature." Id. at 633-34. While the full

implications of *Boyd's* broad language have occasionally been foreclosed by the Supreme Court,[3] the Court has reaffirmed *Boyd's* central holding that civil forfeiture is quasi-criminal in nature. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1963) (holding Fourth Amendment exclusionary rule applies to civil forfeiture proceedings); *United States v. United States Coin & Currency*, 401 U.S. 715 (1971) (holding Fifth Amendment prohibition against self-incrimination applies to civil forfeiture proceedings); *United States v. Halper*, 490 U.S. 435 (1989) (holding Double Jeopardy Clause applies to civil forfeiture proceedings). "When the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise." *United States Coin & Currnecy*, 401 U.S. at 721.

In the case at hand, the government has requested relief closely analogous to civil forfeiture, including, among other things, divestiture, disgorgement, and a wide-ranging dissociation injuction. In my view, the RICO remedies a sought by the government in this case go beyond the roughly compensatory. I recognize, however, that this view has not been adopted by the courts of this circuit in similar cases. Because I believe those decisions to rest on incomplete analyses, it may prove useful to set forth the basis for my disagreement.

In the limited context of the Fifth Amendment's applicability to RICO, several courts, including this one,

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3. "[T]his Court has declined, however, to give full scope to the reasoning and dicta in *Boyd*. . . ." *United States v. Ward*, 448 U.S. 242, 253 (1980). *See also Fisher v. United States*, 425 U.S. 391, 405-9 (1976) (overruling *Boyd's* extension of Fifth Amendment privileges to all private papers, but upholding its applicability to those containing incriminating testimony).

have held that equitable remedies, such as divestiture, disgorgement, and injunction, are remidial, non-punitive, forms of relief. *See, e.g., United States v. Ianniello*, 824 F.2d 203, 208 (2nd Cir. 1987); *United States v. Bonanno Organized Crime Family*, 683 F. Supp. 1411, 1450-51 (E.D.N.Y. 1988). First, these decisions employ only the *United States v. Ward* test of criminality, without considering whether RICO remedies sought in those cases were quasi-criminal. The Supreme Court has recently rejected similarly myopic approaches to civil forfeitures in *Austin v. United States*, 113 S. Ct. 2801, 2805-06 (1993). Holding that the Excessive Fine Clause may limit the amount of a civil forfeiture under 21 U.S.C. § 881, the Court stated that "the question is not, as the United States would have it, whether forfeiture... is civil or criminal, but whether it is punishment." Id.[4] Thus, the Supeme Court has instructed that the resolution of questions turning on punishment ought not rely on the all-or-nothing criminality analyses of *Ward*. Second, the *Bonanno* and *Ianniello* analysis rely on *United States v. E. I. Du Pont de Nemours & Co.*, 366 U.S. 316 (1961), which upheld disgorgment and divestiture as remidial relief under the antitrust statutes. I

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4. The Court went on: "For this reason, the United States' reliance on *Kennedy v. Mendoza-Martinez* and *United States v. Ward* is misplaced. . . . The question in those cases was whether a nominally civil penalty should be reclassified as criminal and the safeguards that attend a criminal prosecution should be required. In addressing the separate question whether punishment is being imposed, the Court has not employed the tests articulated in *Mendoza-Martinez* and *Ward*. See, e.g., *United States v. Halper*. . . ." *Austin*, 113 S. Ct. at 2806, n. 6 (citations omitted).

agree that disgorgment of ill-gotten gains constitutes a nonpunitive relief.[5] But as to divestiture, the analogies to antitrust are misplaced. As one commentator has noted, "[w]hile antitrust divestiture requires the dispossession of the specific interest that created the unlawful monopoly power, under [RICO] a defendant can be forced to divest himself of his entire interest in an enterprise because some investments stem from violations RICO." Fuerstman, supra, at 187. Moreover, antitrust divestiture requires no predicate criminal offense, while civil RICO divestiture follows exclusively from the commission of criminal acts. In their sweeping reach, civil RICO's divestiture provisions parallel the civil forfeitures in *Boyd*. Rather than provide injured parties with rough compensation for the injuries caused by the defendant, civil RICO divestiture "forces the defendant to divest his entire interest in an enterprise so long as a portion of the funds invested in that enterprise was obtained in violation of RICO." Id. Thus, to the extent that a defendant is required to extract herself entirely from an enterprise, beyond the ascertainable reach of the racketeering taint, the court is in effect imposing a civil forfeiture.[6] Total divestiture eliminates the defendant's ability to maintain a future income derived from the legitimate, untained, portion of the divested enterprise. The point is important because non-remedial forfeitures-

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6. *Cf. United States v. Property at 4492 S. Liyonia Road*, 330 F.2d 1258, 1270 (2d Cir. 1989) ("At some point, it seems that a forfeiture would cross the line of condemning the instrumentality of crime and move into the area of punishing a defendant by depriving him of his estate.").

uncompensated takings of property- clearly serve retributive goals.[7] Thus, in my view, civil RICO divestiture must be distinguished from antitrust divestiture on the basis of RICO's vastly wider scope, its failure to restrict available remedies to rough compensatory measures, and its predicate criminal offense requirement. Together, these features convert civil RICO divestiture into a punitive sanction.

In addition to divestiture and disgorgement, the government seeks to enjoin Ferrante from any involvement in any solid waste enterprise; from participating in the affairs of any union; and from associating with any of the other defendants for commerical purposes. While I have no quarrel with the necessity of such injunctions in the fight against organized crime, it simply cannot be denied that they are punitive measures. Dissociation orders and lifetime bans neither compensate victims nor prevent unjust enrichment. On the contrary, they serve to punish wrongdoers and deter others from similar courses of action. In sum, the relief sought by the government in this case goes beyond rough compensation to serve the goals of retibution and deterrence and therefore constitutes punishment. *See Halper*, 490 U.S. 448 ("punishment serves the twin aims of deterrence and retibution"); *Mendoza-Martinez*, 372 U.S. at 168 (deterrence and retribution are "traditional aims of punishment").

Thus, in light of *Boyd*'s still vital holding that "suits for penalties and forfeitures, incurred by the commission of offenses against the law, are of this quasi-criminal nature," I conclude that the action before us must be considered quasi-

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7. Recognizing as I do the impracticality of partial divestment in organized crime cases, I do not mean to suggest that total divestment should be disfavored out of sympathy for the defendant. Rather, by labeling RICO remedies punitive, I seek only to call a duck a duck.

criminal. *Boyd*, 116 U.S. at 634.

II. THE CONSEQUENCE OF QUASI-CRIMINALITY

Because I believe this case to be quasi-criminal in nature, I believe that summary judgment was an inappropiate procedual mechanism by which to find Ferrante liable under RICO. More accurately, in the context of this motion for a stay, I believe that Ferrante has demonstrated a substantial possibility of success on appeal on the issue of summary judgment's propriety in a quasi-criminal action.

It must be conceded that several cases have been reported in which a defendant was found liable under RICO through the use of summary judgment. *See Beneficial Standard Life Ins. Co. v. Madariaga*, 851 F.2d 271, 276-77 (9th Cir. 1988) ; *Crawford v. La Boucherie Bernard Ltd.*, 815 F.2d 117, 122 (D.C. Cir. 1987); *Aetna Casualty & Surety Co. of Illinois v. Levy*, No. 83-C-3566, 1985 WL 2131 (N.E.I11. July 24, 1985). However, none of these involved the federal government as a plaintiff. The only reported case in which the court upheld a grant of summary judgment in favor of the plaintiff in a government-prosecuted civil RICO action is *United States v. Private Sanitation Indus. Ass'n*, 995 F2d 375 (2d Cir. 1993) ("Avellino"). In that case, RICO liability was imposed in Salvatore Avellino, one of Ferrante's co-defendants, by means of summary judgment. The equitable remedies upheld against Avellino were virtually identical to those the government seeks to impose on Ferrante. Id. at 377-78. However, none of the cases granting or upholding a grant of summary judgment address the legal question of whether summary judgment ought to be available in a quasi-criminal-that is, punitive- action predicated on criminal behavior. Thus, while I recognize that we are bound by the result in *Avellino*, I must nevertheless express my disagreement with its premise of procedural regularity.

In my view, because a finding of liability constitutes a finding that the defendant has committed criminal acts, the

conventional standards for summary judgment, *see Celotex v. Catrett*, 477 U.S. 317 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), provide inadequate protection to civil RICO defendants. The prospect of punitive liability in a quasi-criminal action demands that the court afford the defendant something akin to a presumption of innocence.[8] Unless the defendant has made no attempt to refute the government's allegations, the government ought to be required to prove the defendant's liability at trial. The nature of quasi-criminal remedies requires that trial courts refain from engaging in pre-trial weighing of evidence where the defendant has come forward with assertions which, if credited where all of the elements of civil RICO liability were either uncontested by the defendant or established by the preclusive effect of prior criminal convictions.

In the case before us, the availability of serverance renders the government's use of summary judgment unnecessary. Fed. R. Crim. Proc. 14. Ferrante could easily be served from his co-defendants and tried seperately. Given the vast size of this case, little additional burden would be imposed by a requirement that the government prove the second predicate offense and enterprise elements before a trier of fact.

In sum, my belief that Ferrante has a substantial possibility of success on appeal begins with my conviction that summary judgment ought not be employed to impose quasi-criminal liability, except in cases entirely devoid of

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8. The Second Circuit has held that the preponderance of the evidence standard applies to all elements of a civil RICO claim. *Cullen v. Margiotta*, 811 F.2d 698, 731 (2d Cir. 1987). I note that despite strong dictum in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 491 (1985), suggesting the inappropriateness of more stringent standards, the Supreme Court has declined to decide the issue.

contested material facts.

III. THIS CASE MUST BE DISTINGUISHED FROM AVELLINO

Recognizing that we are bound by *Avellino's* approval of the use of summary judgment in a similar case, I nevertheless believe that Ferrante has demonstrated a substantial possibility of success on appeal by pointing out a critical distinction between the two cases: In *Avellino,* both requisite predicate acts were established by the defendant's prior guilty pleas, while Ferrante was held liable on the basis of only one prior guilty plea. The second requisite predicate act was established by means of the affidavits of three former employees of the Oyster Bay weighing station. In particular, the affidavit of Joseph Vittorio stated that Vittorio has personally accepted payments from Ferrante in exchange for the falsification of weight information. The district court held that Vittorio's affidavit was uncontradicted because Ferrante failed to produce a counter-affidavit by an individual with personal knowledge. Because the Vittorio affidavit does not describe specific incidents of bribery, including dates, times, and locations, it is unclear whether any affidavits- other than an express denial by Ferrante[9] or a detailed second-hand accounting of

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9. Ferrante has invoked his Fifth Amendment privilege against self-incrimination. While it is clear that adverse inferences may be drawn from a defendant's refusal to provide evidence in civil RICO actions in which the government is a party, it is also true that "an adverse inference drawn from the assertion of the Fifth Amendment privilege in a civil proceeding may not be the sole basis for imposing liability upon a defendant." *United States v. Bonanno Organized Crime Family,* 683 F. Supp. 1411, 1451-52 (E.D.N.Y. 1988). I agree with the district court that the affidavits of the Oyster Bay employees constitute independent corroborative evidence sufficient to permit the drawing of an adverse inference in this case.

his every movement across the years of the alleged bribery-could create a genuine issue of material fact in the eyes of the district court.

The affidavit of Joseph Ferrante, Nicholas Ferrante's son, presents a close call. An executive of his father's corporations, Joseph Ferrante states that he has worked with his father since the early 1970s and has "been with him virtually on a daily basis since that time." Affirmation of Joseph Ferrante at 1. Viewing his affidavit in its entirety, it is clear that Joseph Ferrante could not have avoided personal knowledge of any pattern of bribery committed by his father in connection with Unique and U-Need, his carting companies, over a period of years. In light of the quasi-criminal nature of this action, I believe that any doubts as to whether a genuine issue of material fact has been created must be resolved in favor of the defendant. Thus, I believe that Joseph Ferrante's affidavit should have precluded summary judgment on the second predicate offense.

In addition, Joseph Ferrante's affidavit created a genuine issue of material fact as to a critical component of the enterprise element of RICO liability. The district court relied, in part, upon the Declaration of Special Agent Donald McCormick in concluding that Nicholas Ferrante was involved in the illegal racketeering activities of the Luchese crime family. Joseph Ferrante denies any relationship between his father and the Luchese organization. Despite its recitation of McCormick's allegations, the district court apparently believed that to establish the enterprise element the government need only prove that Nicholas Ferrante owned and operated his two carting companies. In my view, the government must show

that Ferrante was involved in the enteprise of the Private Sanitation Industry Association.[10] Joseph Ferrante's affidavit constitutes a denial of such involvement by an individual with the necessary personal knowledge.

In sum, in light of the quasi-criminal nature of this action, Joseph Ferrante's affidavit must be considered to have created genuine issues of material fact as to the second predicate act and the enterprise element of civil RICO liability.

IV. CONCLUSION

I believe that Nicholas Ferrante has demonstrated s substantial possibility of success on appeal and that none of the other three Hirschfeld factors counsel against the resolution of Ferrante's appeal.[11] Thus, a limited stay is necessary. I believe that a stay can be crafted which will adequately protect the rights and interests of all parties involved. I agree that (1) the assets of Ferrante and his companies should be frozen pending the resolution of his appeal, (2) he should be enjoined from transferring or encumbering any assets, (3) he should be enjoined from

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10. I accept the district court's earlier determination in *United States Private Sanitation Indus. Ass'n.*, 811 F. Supp. 808, 815 (E.D.N.Y. 1992), that the Private Sanitation Industry Association constitutes an enterprise within the meaning of RICO.

11. I do not believe that any of the other three *Hirschfeld* factors weigh heavily either for or against a stay in this case. The public's interest in the immediate commencement of disgorgement and disinvestment proceedings against Ferrante shrinks in light of the fact that we have granted Ferrante an expedited appeal and that dozens of PSIA defendants remain untried. In my view, the public interest also includes the preservation of procedural fairness, even for defendants against whom the government has assembled a strong case.

communicating with his carting businesses and co-defendants in any manner, and (4) his companies should be enjoined from engaging in any transactions outside the ordinary course of business. Additionally, in order to preserve the status quo, I would enjoin the government from commencing disvestment and disgorgement proceedings pending the resolution of the appeal. Such a stay would adequately protect the government's interest if it prevails on appeal on the merits, and will correspondingly protect Ferrante's rights if he is successful on appeal.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PRIVATE SANITATION INDUSTRY ASSOCIATION OF NASSAU/SUFFOLK, INC., *et al.*,

Defendants.

Plaintiff, the United States of America, moves for summary judgment pursuant to Federal Rule of Civil Procedure 56, providing for broad injunctive relief against defendant Nicholas Ferrante ("Ferrante") under the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1961 et seq. ("RICO"). Defendant Ferrante requests a continuance to conduct discovery pursuant to Federal Rule of Civil Procedure 56 (f) and seeks to strike from the Government's papers in support of its summary judgment motion reference to the February 1994 guilty plea of Salvatore Avellino ("Avellino") in *United States v. Avellino*, 90-CR-446.

FACTS

The United States brought this civil RICO action against 112 defendants, alleging that they engaged in a pattern of racketeering activity by committing illegal acts and by using force and threatening to use force against other individuals engaged in the collection of solid waste on Long Island. The underlying facts and the identies of the carious defendants are set out in United States v. Private Sanitation Indus. Ass'n, 793 F. Supp. 1114, 1121-23 (E.D.N.Y. 1992) ("PSIA"), familiarity with which is assumed.

For purposes of this motion, the relevant facts are as follows. Ferrante has been involved in the carting industry on Long Island through his companies Unique Sanitation ("Unique") and U-Need-A-Roll-Off ("U-Need"). Declaration of Joseph R. Vittorio ("Vittorio Decl.") ¶ 43;

Declaration of Jerome J. Kowalski ("Kowalski Decl.") ¶ 32. Declaration of Peter Stramiello ("Stramiello Decl.") ¶ 39. In addition, Ferrnate is reputed to be associated with the Luchese crime family. Plaintiff's Statement Pursuant to Local Rule 3 (g) ("Plaintiff's 3 (g) Statement") ¶ 2. In that capacity, Ferrante is reputed to have worked closely with Avellino, a reputed caporegime in the Luchese family, in controlling trade waste collection on Long Island. Plaintiff's 3 (g) Statement ¶ 8, Declaration of Donald W. McCormick in Support of Plaintiff's Motion for Summary Judgment ('McCormick Decl."), ¶ ¶ 19-22. It is alleged that Ferrante was a principal "bagman" for Avellino and the Lucheses and, in that capacity, assisted Avellino on a regular basis in collecting extortion payments from carters for the Luchese crime family. Plaintiff's 3 (g) Statement ¶ 13.

On October 17, 1986 Ferrante pleaded guilty to coercion in the first degree in violation of New York Penal Law §135.65 (1), a class D felony.[1] Transcript of October 17, 1986 Plea Allocution in New York State County Court, Suffolk County ("Plea Transc."), p. 9 (Exh. 28 to McCormick Decl.). In pleading guilty, Ferrante stated:

> Your Honor between on or about December 1981 and October 1983, in the County of Suffolk, I Nicholas Ferrante, intentionally and knowingly violated the law by inducing Robert Kubecka and Jerome Kubecka to refrain from bidding for (and) soliciting certain carting customers by instilling in the Kubeckas a fear that I would damage the Kubecka property.

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1. Ferrante's company Unique Sanitation pleaded guilty to attempted coercion in the second degree. Plea Transc., at 11.

McCormick Decl. ¶ 44; Plea transc. at 10.[2]

It is alleged that from January 1982 through February 1985, Ferrante, U-Need and Unique Sanitation "knowingly, willfully and intentionally commit[ted] acts chargeable under state law at the time of their commission as [grand larceny... involving bribery], [attempted grand larceny... involving bribery], bribery in the Second Degree, Attempted Bribery in the Second Degree, Rewarding Official Misconduct in the Second Degree, Bribe Receiving in the Second Degree, Attempted Bribe Receiving in the Second Degree, and Receiving Reward for Official Misconduct in the Second Degree[.]" Complaint ¶ 160. It is also alleged that Ferrante and others attempted to and did take property from the Town of Oyster bay "by unlawfully placing garbage in the Oyster Bay town dump, thereby taking garbage disposal space, without paying the required fees." Complaint ¶ 161. Ferrante is also alleged to have aided and abetted certain defendants in "solicit[ing] and accept[ing] bribes and rewards [.]" Complaint ¶ ¶ 163, 164.

DISCUSSION

Summary judgment "shall be rendered forthwith if... there is no genuine issue as to any material fact and... the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c). In order for the moving party to be successful, it must "point[] out to the district court... that

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2. In addition, in November of 1957, Ferrante was arrested and subsequently indicted under Section 580 of the New York Penal Code, which prohibited conspiracy to commit the crime of bribing a public officer. Supplemental Declaration of Donald W. McCormick, dated September 19, 1994 (McCormick Supp. 9/94), ¶3. The opinion in *People of the State of New York v. DeCabia,* 172 N.Y.S.2d 1004, 1005-6 (Nassau Co. Ct. 1958), *aff'd* 190 N.Y.S.2d 142 (2d Dept. 1959), *aff'd* 7 N.Y.2d 823, 196 N.Y.S.2d 701 (1959), quotes the indictment, as alleging that

there is an absence of evidence to support the nonmoving party's case." *Calotex Corp. v. Catrett*, 477 U.S. 317, 325 (1985). In opposing a properly supported summary judgment motion, "an adverse party may not rest upon the mere allegations or denials of [its] pleading, but [its] response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56 (e) (emphasis added). The non-movant, however, "must do more that simply show that there is some metaphysical doubt as to the material facts." *Matsishita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "The mere existence of factual issues [pertaining to immaterial facts] will not suffice to defeat a motion for summary judgment." *Quarles v. General Motors Corp.*, 758 F. 2d 839, 840 (2d Cir. 1985).

"The moving party is 'entitled to a judgment as a matter of law' [if] the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). In deciding a summary judgment motion, the court need not resolve disputed issue of fact, but need only to determine whether there is any genuine issue to be tried. *Eastman Mach. Co.,*

> the defendants agreed to give to said official the approximate sum of $1,105 to induce him to refrain from any official action which would tend to initiate the operation of a public garbage district of the Town of Oyster Bay and thus permit the defendants, who were engaged in the business of private sanitation collection in said area, to continue their business without interference.

Ferrante pleaded guilty to a misdemeanor conspiracy charge in that case on June 27, 1958. McCormick Supp. 9/94 ¶4.

Inc. v. United States, 841, F. 2d 469, 473 (2d Cir 1988). A genuine factual issue exists if there is sufficient evidence favoring the nonmovant such that a jury could return a verdict in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The nonmoving party, therefore, must come forward with facts, and not doubts as to the veracity of the moving party's allegations; "Rule 56 (e)... requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324. Because Ferrante has failed to show that a genuine issue of material fact exists as nor persuasive, summary judgment against Ferrante is appropiate.

The government has submitted a statement pursuant to Local Rule 3 (g) consisting of 41 paragraphs of facts which it claims are not in dispute. Ferrante submitted a response to the government's Rule 3 (g) statement in which he states that the following specific facts are not in dispute: that this is a civil RICO action, that he and his company Unique Sanitation were indicted by a Suffolk County grand jury in 1983, that he pleaded guilty to the crime of coercion in the first degree and that Messrs. Vittorio, Kowalski and Stramiello were employees of the Town of Oyster Bay. Ferrante asserts the existence of genuine issues of material fact with respect to all the other assertions in the government's 3 (g) statement. However, Ferrante fails to allege specific facts that contradict the government's 3 (g) statement and supporting documents. To support his contradiction of the government's assertions, Ferrante submits affidavits of his son and co-defendant, Joseph Ferrante, and of Gary Pezza, in which those individuals deny knowledge of the allegations of the government and offer alternative interpretations of the events described, but do not assert knowledge of specific facts showing that there is

a genuine issue for trial.

A review of the government's submissions in support of its motion and of Ferrante's submissions in opposition thereto compels this court to conclude that there is no genuine issue of material fact and that the relief the government seeks should, accordingly be granted.

I. CIVIL RICO LIABILITY

To state a cause of action under RICO, 18 U.S.C. § 1962 (a)-(c), a plaintiff must show "(1) that the defendants (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of 'racketeering activity' (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an 'enterprise' (7) the activities of which affect interstate or foreign commerce." *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir. 1983), cert. denied, 465 U.S. 1025 (1984). Each of these elements is satisfied in this case. The first predicate act

Ferrante's guilty plea in the state court to coercion in the first degree conclusively establishes that he has committed one predicate racketeering act. Section 1961 of Title 18 defines "racketeering activity" as:

> (A) any act or threat involving... bribery... which is chargeable under State law and punishable by imprisonment for more than one year; [and] (B) any act which is indictable under... Title 18, United States Code... section 1591 [Hobbs Act] (relating to interference with commerce, robbery, or extortion)...

18 U.S.C. § 1961 (1).

As a preliminary matter, Ferrante contests the preclusive effect of a guilty plea in a state court in a subsequent civil RICO proceeding brought in a federal court. It is well settled, however, that a state court judgment has collateral estoppel effect in a subsequent federal proceeding to the same extent that it would have in a subsequent state action

under state law. *Allen v. McCurry*, 449 U.S. 90, 96 (1980) (citing 28 U.S. C. § 1738). Collateral estoppel precludes a litigant in federal court from relitigating all legal and factual issues conclusively and necessarily determined in an earlier state court action. *Collard v. Incorporated Village of Flower Hill*, 604 F. Supp. 1318, 1322 (E.D.N.Y. 1984), aff'd, 759 F. 2d 205 (2d Cir. 1985), cert. denied, 474 U.S. 827 (1985). As the court has stated:

> The doctrine of collateral estoppel, or issue precluion, bars a party from relitigating in a second proceeding an issue of fact or law that was litigated and actually decided in a prior proceeding, if that party had a full and fair opportunity to litigate the issus in the prior proceeding and the decision of the issue was necessary to support a valid and final judgment on the merits.

Metromedia Co. v. Fugazy, 983 F. 2d 350, 365 (2d. Cir. 1992), cert. denied 112 S. Ct. 2445 (1993).

The facts presented in the instant case duplicate in all material respects the situation in *United States v. Private Sanitation Industry Association*, 811 F. Supp. 808, 813-814 (E.D.N.Y. 1992), aff'd 995 F. 2d 375 (2d Cir. 1993) ("PSIA II"), in which the court held that Avellino's guilty pleas in state court were entitled to preclusive effect. So, too in this case, Ferrante's plea of guilty to the state felony of coercion in the first degree precludes Ferrante from litigating the facts underlying that plea. Furthersome, as is obvious from the testimony of Ferrante in his state court allocution, Ferrante was fully aware of the consequences of his guilty plea. See Exhibit 28 to McCormick Decl. at p. 5. As this court noted in PSIA II, "a defendant who knowingly and voluntarily enters a guilty plea has had a 'full and just opportunity' to litigate the facts underlying his conviction because he 'has chosen not to avail himself of the opportunity to contest th[ose] facts [and] must accept the consequences of his

action." 811 F. Supp. at 814, quoting *Gerney v. Tishman Constr. Corp.*, 136 Misc. 2d 1051, 518 N.Y.S. 2d 564 (sup. Ct. N.Y. Co. 1987).

Although, as Ferrante's counsel correctly notes, this court has previously held that the state offense of coercion in the first degree does not constitute a RICO predicate act under Section 1961 (1) (A), PSIA, 793 F. Supp. at 1133, a conviction for the state felony of coercion in the first degree can establish the elements of a Hobbs Act violation and is thus an indictable offense under Section 1961 (1) (B), thereby constituting a RICO predicate. PSIA II at 814.

A violation of the Hobbs Act, 18 U.S.C. § 1951 occurs when interstate commerce is obstructed through the threat of violence to persons or property. In pleading guilty in October 1986, Ferrante made the following statement:

> Your Honor, between on or about December 1981 and October 1983, in the County of Suffolk I, Nicholas Ferrante, intentionally and knowingly violated the law by inducing Robert Kubecka and Jerome Kubecka to refrain from bidding for, soliciting certain carting customers by instilling in the Kubeckas a fear that I would damage the Kubeckas' property. McCormick Decl., Exhibit 28, Trans. at 10

The terms of the statement made by Ferrante in his guilty plea fall squarely within 18 U.S.C. § 1951. In addition in *United States v. Tropiano*, 418 F. 2d 1069, 1075 (2d Cir. 1969), cert. denied 397 U.S. 1021 (1970), the Second Circuit specifically held that causing another carter to cease

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3. The interstate commerce requirement is also clearly met. As noted in the November 25, 1992 Supplemental Declaration of Donald W. McCormick (filed in support of the Government's summary judgment motion against Avellino) at ¶3, the carting companies affected by Ferrante's activities routinely

the Hobbs Act as to "obtaining property."[3]

The second predicate act

The second predicate act alleged by the government is the New York State crime of Second Degree Bribery under New York State Penal Law § 200.00. That crime involves bribery and is punishable by more than one year imprisonment; accordingly, that crime is a RICO predicate. PSIA II, 811 F. Supp at 814.

> A person is guilty of Bribery in the Second Degree:
> when he confers, or offers or agrees to confer, any benefit upon a public servant upon an agreement or understanding that such public servant's vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influence.

N.Y. Penal Law § 200.00

Evidence submitted by the Government establishes that Ferrante personally bribed officials at the Oyster Bay dump, during the period from January 1, 1982 through February 28, 1985. Affidavits of former Town of Oyster Bay scalehouse employees, Joseph Vittorio, Jerome Kowalski and Peter Stramiello attest that Ferrante bribed employees of the Oyster Bay dump with the understanding that they would improperly assist him in reducing the amount of money his companies were required to pay to the Town for the use of the refuse disposal services. See Vittorio Declaration ¶ ¶ 14, 15, 43; Kowalski Declaration of Joseph Vittorio (Vittorio Supp. Dec.), ¶ 2.

In response to questions about bribe payments in the Tow of Oyster Bay, Ferrante asserted his Fifth Amendment

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purchased trucks from out of state. Thus the government has shown a sufficient nexus to interstate commerce.

privilege. See Transcript of Ferrante's January 14, 1993 Deposition, Exhibit 8 to McCormick Decl., pp. 221-224.

As this court has previously held, an adverse inference may be drawn in a civil RICO proceeding against a defendant who invokes the privlege against self-discrimination. PSIA II, 811 F. Supp. at 812 (citing *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976)). However, liability should not be imposed based solely upon the adverse inference. *United States v. Bonnanno Organized Crime Family of La Casa Nostra*, 683 F. Supp. 1411, 1452 (E.D.N.Y. 1988) (citations omitted), aff'd, 879 F. 2d 20 (2d Cir. 1989). The government must produce "independent corroborative evidence of the matters to be inferred" before liability will be imposed. Id. The governement has met this obligation by presenting unrefuted evidence that Ferrante made payments to scalehouse employees in 1982, 1983, and 1984-85, in order to have his companies' tipping fees reduced. Thus, the Government has clearly established Ferrante's repeated commission of acts constituting the New York State crime of Second Degree Bribery, thereby establishing the second predicate RICO act.[4]
PSIA II, 811 F. Supp. at 814.
Other elements of RICO liability

Ferrante argues that the government has failed to show that the predicate racketeering acts constitute a pattern of racketeering activity. Nicholas Ferrante's Memorandum in

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4. Ferrante has submitted an affidavit of his son, Joseph Ferrante, attesting that 'my father, to the best of my knowledge, never made cash payments to Mr. Vittorio or any other Oyster Bay employee." Affidavit of Joseph Ferrante ¶56. This statement constitutes hearsay and conjecture and is insufficient to defeat a motion for summary judgment. *See Isaacs v. Mid America Body & Equipment Co.*, 720 F. Supp. 255 (E.D.N.Y. 1985).

Opposition to the Government's Motion ("Ferrante Memo") at 17.[5] "[T]o prove a pattern of racketeering activity a plaintiff... must show that the racketeering predicates are related, and that they amount to or pose that threat of continued criminal activity." PSIA, 793 F. Supp. at 1139 (quoting *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989)).

Ferrante's Hobbs Act violation and his briberies are clearly related to his role in the Long Island carting industry, and evince "the same or similar purposes, participants, victims or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." PSIA, 793 F. Supp at 1139. Moreover, Ferrante's activities clearly "Embody a threat to the domination of an industry that has been plagued with corruption for the past decade." PSIA II, 811 F. Supp. at 815.

> Section 1961 (4) provides that:
> "[E]nterprise" includes any individual, partnership, corporation, association, or other legal entity, and any other union or group of individuals associated in fact although not a legal entity[.]

18 U.S.C. § 1961 (4). This court has already held that the PSIA contitutes an enterprise within the meaning of RICO. See PSIA II, 811 F. Supp., at 815.

In order to establish RICO liability, the government must

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5. Ferrante does not challenge the timing element of racketeering acts under RICO which must occur within ten years of each other. 18 U.S.C. §1961(5). Ferrante extorted the Kubeckas "[b]etween on or about December 1981 and October 1983 and the public officials were bribed in or about 1982, 1983, and 1984-85, McCormick Decl. ¶21, well within the ten year time period.

show that Ferrante directly or indirectly invests in, maintains an interest in, or participates in the PSIA (or other RICO) enterprise. The government characterizes Ferrante as an integral part of the carting industry and PSIA enterprises, operating as a "bagman" and "zone captain" for Avellino and the Luchese crime family. Memorandum of Law in Support of Plaintiff's Summary Judgment Motion, p.24; Plaintiff's 3(g) Statement, ¶ 13. Ferrante's role included policing the cartel's "property rights" system and resolving diputes among carters. Plaintiff's 3 (g) Statement, ¶ 8; McCormick Decl ¶ ¶ 33-39. In support of its characterization of Ferrante's role in the carting industry enterprise, the government submits the affidavit of a special agent with the Federal Bureau of Investigation, see McCormick Decl. ¶ ¶ 19, 20, referring to the transcript of various intercepted telephone conversations. In one conversation, between Avellino and Ferrante, Avellino states "you gave me such a big check over here, you must be flush this month." See McCormick Decl., Exhibit 7, p.2-3. Ferrante, invoking his Fifth Amendment privilege against self-incrimination, refused to answer questions relating to this conversation. Exhibit 8 to McCormick Decl., pp. 290-294, McCormick's affidavit also refers to a conversation between Gary Pezza and Jean Allen in which Pezza refers to payments made to "Nicky" to "take care of these things." McCormick Decl., Ex. 9, pp. 1634-1635. Ferrante again asserted his Fifth Amendment privilege when questioned about the nature of these payments.

Ferrante has asserted that there are genuine issues of material fact relating to the characterization of his involvement in PSIA and the carting industry enterprises, in support of which he has submitted the affidavit of his son and co-defendant, Joseph Ferrante, denying the relationship between Ferrante, Avellino and the Luchese family and offering alternative interpretations of the conversations relied on above. Joseph Ferrante Decl. ¶ ¶ 3, 30-38.

Ferrante has also submitted an affidavit of Gary Pezza stating simply that he has "little recollection of the conversation" and "no specific recollection of ever having seen my father give Nicholas Ferrante money." Pezza Affidavit ¶ ¶ 3, 4. Pezza also posits an alternative interpretation of his conversation, stating "I could well have been referring to... payments for services [performed by Ferrante's companies for his father's company] or [charitable and political] contributions." Pezza Affidavit ¶ 6.

However, Ferrante's involvement in the Long Island carting industry is unchallenged and in fact references to his role in the carting industry are made by his son, Joseph Ferrante. See Joseph Ferrante Affidavit, ¶ 31.

Based on these submissions, it cannot be concluded that Ferrante has shown the existence of a genuine issue of material fact as to his civil RICO liability. Accordingly, summary judgment against Ferrante is appropiate.

II. PROPRIETY OF REQUESTED RELIEF

In its motion for summary judgment, the government requests that Ferrante be (a) enjoined from (i) engaging in any activities involved in connection with the collection, transportation or disposal of solid waste, (ii) violating, aiding or abetting the violation of, and/or conspiring to violate any of the provisions of Title 18, United States Code Section 1961 at seq., (iii) participating in the affairs of PSIA or other trade waste association, and from participating in the affairs of Local 813 and its Trust Funds, any other union and its trust funds, (iv) associating with any other defendant or member or associate of organized crime for any commerical purpose and (b) ordered to divest his interests in the enterprises and to disgorge the proceeds derived from his unlawful conduct and participation therein into a Court-administered fund.

The statute provides that the court may order appropiate relief, "including but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any

enterprise; [and] imposing reasonable restrictions on the future activity of any person, including... prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in." 18 U.S.C. § 1964 (a). The Second Circuit upheld this Court's award of simliar relief (including divestiture and disgorgement of the proceeds of his illegal activities) against Avellino. PSIA II, 995 F. 2d at 377. The activities on which Ferrante's RICO violations are based are subsequentially similiar to those for which Avellino was held liable. As the Second Circuit noted, RICO provides "broad discretion and latitude in enjoining violators from activities that might lead to future violations. The injuctions in the instant matter did not exceed the scope of that authority. " Id.[6]

For the reasons set forth in PSIA II, id., the relief requested by the government is appropiate here as well.

III. DEFENDANT'S CROSS MOTION

Additional Discovery under Rule 56 (f)

Ferrante cross-moves pursuant to Federal Rule of Civil Procedure 56 (f), requesting that this court defer ruling on the1 government's motion for summary judgment to allow him to conduct additional discovery.

Under Rule 56 (f), a court may, inter alia, order a continuance to permit a party opposing a summary judgment motion to conduct discovery to ascertain "facts essential to justify the party's opposition..." Fed. R. Civ. P.

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6. The constitutional issues raised by Ferrante have been addressed by the Second Circuit, which noted that "the prohibition on association with known criminals or other defendants for commercial purposes does not violate . . . First Amendment associational rights." *PSIA II,* 995 F.2d at 377; *see, also, United States v. International Brotherhood of Teamsters,* 941 F. 2d 1292, 1297 (2d Cir. 1991), *cert. denied* 112 U.S. 1161 (1992).

56 (f) "[A] party seeking such discovery must file an affidavit explaining (1) what facts are sought and how they are to be obtained, (2) how those facts are reasonably expected to create a genuine issue of material fact, (3) what effort the affiant has made to obtain them, and (4) why the affiant was unsuccessful in those efforts." *Hudson River Sloop Clearwater, Inc. v. Dep't of Navy*, 891 F. 2d 414, 422 (2d Cir. 1989) (citing *Burlington Coat Factory Warehouse Corp. v. Esprit De Corp.*, 769 F 2d 919, 929 (2d Cir. 1985)).

Ferrante supports his motion by submitting an affidavit of his counsel, Paul Batista, requesting additional time to depose Special Agent McCormick and others. Ferrante's request is disingenuous. Ferrante seeks to defend this action by obtaining testimony of others, while continuing to assert the Fifth Amendment privilege with respect to the underlying facts. As this court has ruled previously, "There is no reason to grant a continuance to a litigant who has personal and intimate knowledge of the underlying facts for the purported purpose of conducting discovery to ascertain those identical facts." *PSIA II*, 811 F. Supp. at 817-818.

Batista's assertion that further deposition of McCormick and other defendants will raise genuine issues of material fact is unjustified in view of Ferrante's assertion of his Fifth Amendment privilege and the support lent to McCormick's declarations by independently admissible evidence of which Ferrante is aware.

The request for a continuance to conduct depositions of non-parties Alfonse D'Arco, Salvatore Gravano, Peter Chiodo and Jerry Kubecka, is also disingenuous, as Batista has made no effort to subpoena such persons. *See Burlington Coat Factory v. Esprit de Corp.*, 769 F.2d at 929.

Accordingly, Ferrante's request for a continuance is denied.

Motion to strike references to the Avellino guilty plea

Ferrante seeks to have the government's references to Avellino's guilty plea to racketeering charges stricken from the record. Ferrante bases his request on several alternative theories. In the first instance, Ferrante refers to the government's assertion at the allocution that it does not "intend to use Mr. Avellino's guilty plea or allocution against any defendant in this case, or against any unindicted co-conspirator that's been identified . . . And we don't have any present intention of using Mr. Avellino's guilty plea or allocution against anyone at this time." Ex. 6 to McCormick Decl., at 15. The government notes that Ferrante was neither a defendant nor an identified co-conspirator in that criminal action, *United States v. Salvatore Avellino,* No. 90-CR-446 (E.D.N.Y. Feb. 17, 1994). Further, the government asserts that the statement simply described the government's intention at the time, and in fact the statement is carefully limited to *present* intention with respect to use of the indictment against "anyone." The government's use of this allocution in these papers prepared and filed almost two months subsequent to the date of the allocution is, accordingly, not technically precluded by its statement of intent at Avellino's allocution.

Ferrante also argues that the allocution should be precluded as inadmissible hearsay for which no exception is available. Fed. R. Ev. 801(c), 802, 803. The government notes that the courts have routinely relied on prior trial testimony as proper evidence in deciding summary judgment motions. *See, e.g., Kelley v. Price-Macemon.,* 992 F.2d 1408, 1415 n. 12 (5th Cir. 1993), *rehearing denied* 999 F.2d 1518 (5th Cir. 1993), *cert. denied,* 114 S.Ct. 688 (1994) ("It is well-settled that a certified transcript of a judicial proceeding may be considered on a motion for summary judgment"). Although the cases cited by the government all involve situations in which the parties to the summary judgment motion were parties to the trial in which

the testimony was offered, the underlying logic in determining whether to admit previous trial testimony applies.[7]Such testimony is admissible on the same basis as affidavit testimony--thus, admissibility turns on the nature of the underlying testimony. Thus, before this court considers the underlying testimony to determine whether it is hearsay, or qualifies for one of the hearsay exceptions, the court must examine whether the evidence is relevant to this action.

The government asserts that the Avellino allocution is submitted not to prove the existence of any of the necessary elements of RICO liability, but rather to prove "the nature, extent and viciousness of the Long Island carting enterprise. ." Plaintiff's Reply Memo at 21. Ferrante's liability for the RICO violations does not depend on proof of this element. Thus, the proof related thereto is not relevant and is inadmissible under the Federal Rules of Evidence. Fed. R. Evid. 402. In any event, even if the Avellino allocution were admissible, its minimal probative value would be far outweighed by its prejudicial impact. Fed. R. Evid. 403.

Accordingly, Ferrante's motion to preclude the Avellino allocution is granted.

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7. Ferrante asserts that the allocution statements should be precluded because his Sixth Amendment confrontation rights would be violated. *California v. Green,* 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed. 2d 489 (1970). This argument is without merit. This case is brought by the government to assert civil RICO liability; accordingly, Ferrante's sixth amendment rights are not in question.

CONCLUSION

For the foregoing reasons, plaintiff's motion for summary judgment is granted. Defendant's cross-motion requesting a continuance to conduct discovery is denied. Defendant's cross-motion to strike references to the Avellino guilty plea from the Government's papers in support of its motion is granted.

SO ORDERED.

Dated: Brooklyn, New York
October 13, 1994

s/ I. Leo Glasser
I. Leo Glasser, U.S.D.J.